Azilah bin Hadri & Anor v Public Prosecutor and another appeal

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS B-06A-19 OF 2009 AND B-06A-19A OF 2009
APANDI ALI, LINTON ALBERT AND TENGKU MAIMUN JJCA
23 AUGUST 2013

Criminal Law — Penal Code — s 34 — Common intention — Ingredients and test for — Whether absence of finding by trial judge on ingredient of common intention amounted to misdirection by way of non-direction

Criminal Procedure — Trial — Misdirection — Whether trial judge failed to consider defence of alibi of first appellant sufficiently — Whether trial judge failed to consider challenge raised by defence on exhibits — Whether trial judge failed to make finding as to whether there alteration or tampering of data in exhibits that affected its authenticity — Whether failure amounted to serious misdirection — Whether trial judge's failure to make finding to connect explosives and appellants amounted to serious misdirection — Whether there were gaps in prosecution's case — Whether misdirections resulted in serious and substantial miscarriage of justice to appellants — Whether cumulative effect of non-directions rendered convictions of appellants unsafe

Evidence — Information leading to fact discovered — Admissibility of statements — Whether statements led to discovery of crime scene and jewellery belonging to deceased — Whether trial judge had failed to consider doubts raised as to accuracy of appellants' s 27 statements — Whether failure amounted to non-direction

Evidence — Witness — Failure to call witness — Whether non-calling of DSP Musa created gaps in prosecution case — Whether adverse inference ought to be drawn against prosecution

On 20 October 2006, one Altantuya Sharibuu ('the deceased'), a Mongolian citizen was reported as missing. A police investigation into the disappearance of the deceased led to the discovery of fragments of human bone and tissue, which the DNA analysis proved to be that of the deceased, in the forest area in Puncak Alam, Selangor. Having examined the remains, the Forensic Pathologist certified the cause of death as 'probable blast related injuries'. The prosecution's case, which rested on circumstantial evidence, showed the deceased to be last seen with the first and second appellants ('the appellants'), who were members

of the Special Action Unit of Polis DiRaja at Bukit Aman, Kuala Lumpur with the rank of Inspector and Corporal respectively. The appellants were charged with an offence under s 302 read together with s 34 of the Penal Code ('Code'), ie that in furtherance of their common intention, they had on the night of 19 October 2006 committed the murder of the deceased. According to the prosecution case the deceased had been having an affair with one Abdul Razak bin Abdullah ('the third accused'), and when the affair ended the deceased had apparently blackmailed and harassed the third accused and his family. As a result of the harassment and threats from the deceased, the third accused had sought assistance from one DSP Musa bin Safri ('DSP Musa') to arrange for the police to patrol the vicinity of his house at Damansara Heights. The appellants were the police officers who had at the request of DSP Musa agreed to undertake the task of patrolling the house. According to the prosecution witnesses on the night of 19 October 2006, when the deceased came to the house of the third accused, she had been taken away in a car driven by the first appellant together with the second appellant and another to Bukit Aman. At Bukit Aman, the deceased was last seen in the car of the second appellant. The third accused was charged for abetting the appellants in the commission of the murder and the cases of murder and abetment were heard together. Apart from the evidence showing the deceased to be last seen with the appellants, the prosecution relied on, inter alia, the call logs from the handphone of the first appellant; the statements of the first appellant leading to the discovery of the crime scene; the statements of the second appellant leading to the discovery of the jewellery belonging to the deceased; the discovery of a pair of slippers smudged with blood in the second appellant's car and the discovery of a spent cartridge from inside the second appellant's car to establish their case against the appellants. In the course of the trial, the trial judge found that the evidence had negated and nullified the act of abetment as alleged against the third accused. Consequently, at the end of the prosecution's case, the trial judge found that the prosecution had made out a prima facie case against the first and second appellants and thus the appellants were called to enter defence while the third accused was acquitted and discharged. In his defence, the first appellant testified under oath that at the material date and time, he was neither at the scene of the crime, as per his notice of alibi, nor the last person to be with the deceased having already handed her over to the second appellant to send back to the hotel. The first appellant also denied uttering those statements relating to the crime scene which was admitted by the court as evidence leading to discovery of facts under s 27 of the Evidence Act 1950 ('Act'). In his unsworn statement from the dock, the second appellant claimed that he was innocent and that he had been made a scapegoat. The trial judge found that the prosecution had proved its case against both the appellants beyond reasonable doubt and accordingly found both appellants guilty and convicted as charged whereby both the appellants were sentenced to death. These were the appellants' appeals against that decision.

Held, allowing the appeals:

(1) The entries in the station diary, which were a true and accurate record,

and the call detail record of the first appellant's handphone, showed that the first appellant was at Wangsa Maju and at Bukit Aman at the material time. However, nowhere in the grounds of judgment, had the trial judge considered that the two contradicting sets of evidence showed that by reason of the presence of the first appellant thereat, he could not be or was unlikely to be at Puncak Alam. In the circumstances, the trial judge had misdirected himself by way of non-direction in failing to consider the evidence. In addition, the trial judge had further misdirected himself in making a finding that the entries in the station diary were not formally proven when the finding that ought to have been made was whether the defence had cast a reasonable doubt on the prosecution case that the first appellant was at the scene of the crime. In the circumstances, the trial judge had failed to consider the defence of alibi of the first appellant sufficiently and independently of the second appellant's defence (see paras 17–23).

(2) The first appellant's submission that the chart of the call logs and coverage predictions was inaccurate as to the actual geographical location of its coverage and inadmissible under s 83 of the Evidence Act 1950 had merit. Notwithstanding the absence of any rebuttal evidence from any other witness, the testimonies of the persons responsible for preparing the computer printouts had inevitably put into issue the reliability and accuracy of the call logs and the coverage prediction. These call logs and coverage prediction were important pieces of evidence to establish the presence of the first appellant at the scene of the crime and thus it was essential for the trial judge to address his mind to the challenge raised by the defence on the exhibits and to make a finding whether there was in fact an alteration or tampering of the data and whether the authenticity of the data was questionable or otherwise. The trial judge's failure to do so would amount to a serious misdirection, which rendered the said exhibits unsafe to be relied upon (see paras 24–29 & 37–46).

(3) In the light of the conflicting and inconclusive account of events as regards the discovery of the crime scene and the black jacket and the jewellery belonging to the deceased, the trial judge ought to have been vigilant and examined whether the contradictions or inconsistencies in the evidence of the prosecution witnesses were material; examined the credibility of the police officers who had interrogated the appellants with regard to the s 27 information; examined whether the appellants had raised a doubt on the accuracy of their respective s 27 statements and examined whether the discovery was made by virtue of and exclusively as a result of the information supplied by the appellants and not from other sources. In the present case, the trial judge failed to undertake such an exercise before admitting the statements under s 27 and consequently there was a non-direction by the trial judge (see paras 54–62 & 74–80).

(4) After having made a finding on the connection between the explosives and the death of the deceased, the trial judge should have made a further finding to connect the explosives and the appellants. By not making sufficient appraisal of such evidence in order to make any finding on possession by the appellants of the explosives used in the commission of the murder, the trial judge had failed to address his mind on this missing link resulting in yet, another misdirection (see paras 81–83).

(5) Although it was the prosecution's stand that there was no need for DSP Musa to be called as a witness and that the non-calling of DSP Musa created no gap in the prosecution case, the evidence established that the appellants' task was to patrol the vicinity of the third accused's house and that the presence of the appellants at the third accused's house on the night of 19 October 2006 was upon the request for such assistance from the third accused to the first appellant through DSP Musa. As only DSP Musa could confirm the scope of the request made by the third accused to him, DSP Musa was an important witness to unfold the event, to offer explanation of the facts and to close the gap in the narrative of the prosecution's case. In the circumstances, the failure of the prosecution to call or offer for cross examination DSP Musa would have triggered the adverse inference under s 114(g) of the Act, against the prosecution (see paras 84–89).

(6) Apart from the fact that a pair of slippers smudged with blood stains was recovered from the second appellant's car, the prosecution led no evidence to show any nexus between the slippers and the second appellant. The trial judge also failed to consider that the slippers were recovered after the key to the second appellant's car was taken by another police officer, one DSP Khairi. There was also grave suspicion that DSP Khairi could have had something to do with the appearance of the spent cartridge recovered from inside the second appellant's car. However, the trial judge had failed to direct his mind to these gaps in the prosecution's case (see paras 90–100).

(7) The charge against the appellants was under s 302 read together with s 34 of the Code ie that pursuant to the common intention of both of them, they had committed the murder of the deceased. However, in the grounds of judgment, the trial judge had made no finding on whether the prosecution had established that there was any pre-arranged plan by the appellants to commit murder and that murder was committed pursuant to that plan. The absence of such a finding by the judge on the ingredient of common intention amounted to a misdirection by way of non-direction (see paras 105–106).

(8) As a general rule, the court would quash a conviction where there has been a misdirection. Exceptionally, a conviction would be upheld despite a misdirection where the court was satisfied that a reasonable tribunal

would have convicted the accused on the available evidence on a proper direction. However, based on the evidence adduced in the present case, this was not a fit and proper case to invoke the proviso. The court below had ignored and overlooked salient facts and evidence favourable to the appellants which had resulted in serious and substantial miscarriage of justice to the appellants. The cumulative effect of these non-directions rendered the convictions of the appellants unsafe. Further, the prosecution's case relied on circumstantial evidence, which was insufficient and not strong enough to sustain the finding of guilt of the appellants (see paras 108–109).

[Bahasa Malaysia summary

Pada 20 Oktober 2006, Altantuya Sharibuu ('si mati'), seorang warganegara Mongolia telah dilaporkan hilang. Siasatan polis berhubung kehilangan si mati membawa kepada penemuan cebisan tulang dan tisu manusia, yang mana analisa DNA membuktikan adalah si mati, dalam kawasan hutan di Puncak Alam, Selangor. Setelah memeriksa mayat tersebut, ahli patalogi forensik mengesahkan sebab kematian sebagai 'probable blast related injuries'. Kes pendakwaan yang berdasarkan keterangan keadaan menunjukkan si mati telah dilihat bersama perayu-perayu pertama dan kedua ('perayu-perayu'), yang merupakan anggota-anggota Unit Tindakan Khas Polis DiRaja di Bukit Aman, Kuala Lumpur dengan masing-masing berpangkat Inspektor dan Korporal. Perayu-perayu telah dituduh kerana kesalahan di bawah s 302 dibaca bersama s 34 Kanun Keseksaan ('Kanun'), iaitu berikutan niat bersama, mereka telah pada malam 19 Oktober 1996 membunuh si mati. Menurut kes pendakwaan si mati mempunyai hubungan dengan Abdul Razak bin Abdullah ('tertuduh ketiga'), dan apabila hubungan itu berakhir si mati dikatakan telah memeras ugut dan mengganggu tertuduh ketiga dan keluarganya. Akibat daripada gangguan dan ugutan daripada si mati, tertuduh ketiga memohon bantuan DSP Musa bin Safri ('DSP Musa') untuk menguruskan agar polis membuat rondaan di kawasan rumahnya di Damansara Heights. Perayu-perayu merupakan pegawai-pegawai polis yang mana atas permintaan DSP Musa telah melakukan rondaan di rumah itu. Menurut saksi-saksi pendakwaan pada malam 19 Oktober 2006, apabila si mati datang ke rumah tertuduh ketiga, dia telah dibawa pergi menaiki sebuah kereta yang dipandu oleh perayu pertama bersama perayu kedua dan seorang lagi ke Bukit Aman. Di Bukit Aman, si mati telah buat kali terakhir dilihat dalam kereta perayu kedua. Perayu ketiga telah dituduh kerana bersubahat dalam perlakuan membunuh dan kes-kes bunuh dan persubahatan telah didengar bersama. Selain daripada keterangan yang menunjukkan si mati telah dilihat bersama perayu-perayu, pendakwaan bergantung kepada, antara lain, log-log panggilan daripada telefon bimbit perayu pertama; kenyataan-kenyataan perayu pertama yang membawa kepada penemuan tempat kejadian; kenyataan-kenyataan perayu kedua yang membawa kepada penemuan barang kemas milik si mati; penemuan sepasang selipar berlumuran darah dalam kereta perayu kedua dan penemuan kartrij

kosong daripada dalam kereta perayu kedua untuk membuktikan kes mereka terhadap perayu-perayu. Sepanjang perbicaraan, hakim perbicaraan mendapati bahawa keterangan menidakkan dan membatalkan tindakan persubahabatan sebagaimana didakwa terhadap tertuduh ketiga. Berikutan itu, di akhir kes pendakwaan, hakim perbicaraan mendapati bahawa pendakwaan telah membuktikan kes prima facie terhadap perayu-perayu pertama dan kedua dan oleh itu perayu-perayu telah dipanggil untuk memasukkan pembelaan manakala tertuduh ketiga telah dilepas dan dibebaskan. Dalam pembelaannya, perayu pertama memberi keterangan bersumpah bahawa pada masa dan tarikh matan, dia tidak berada di tempat kejadian, sebagaimana dalam notis alibinya, dan bukan orang terakhir yang bersama si mati setelah menyerahkan si mati kepada perayu kedua untuk dihantar balik ke hotel. Perayu pertama juga menafikan telah menyebut kenyataan-kenyataan berkaitan tempat kejadian yang telah diterima oleh mahkamah sebagai keterangan yang membawa kepada penemuan fakta di bawah s 27 Akta Keterangan 1950 ('Akta'). Dalam kenyataan tidak bersumpahnya dari kandang tertuduh, perayu kedua mengatakan bahawa dia tidak bersalah dan bahawa dia telah dijadikan kambing hitam. Hakim perbicaraan mendapati bahawa pendakwaan telah membuktikan kesnya terhadap kedua-dua perayu melampaui keraguan munasabah dan sewajarnya mendapati kedua-dua perayu bersalah dan mensabitkan sebagaimana dituduh yang mana kedua-dua perayu telah dihukum mati. Berikut adalah rayuan-rayuan perayu-perayu terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan-rayuan:

(1) Kemasukan dalam diari balai, yang merupakan rekod yang benar dan tepat, dan rekod terperinci panggilan telefon bimbit perayu pertama, menunjukkan bahawa perayu pertama berada di Wangsa Maju dan di Bukit Aman pada masa matan. Walau bagaimanapun, tiada dalam alasan penghakiman, hakim perbicaraan telah mengambil kira bahawa dua set keterangan bertentangan menunjukkan bahawa disebabkan kehadiran perayu pertama di situ, dia tidak boleh atau tidak mungkin berada di Puncak Alam. Dalam keadaan berikut, hakim perbicaraan telah salah arah kerana gagal mengambil kira keterangan itu. Tambahan pula, hakim perbicaraan selanjutnya telah tersalah arah dalam membuat dapatan bahawa kemasukan-kemasukan dalam diari balai tidak dibuktikan dengan betul apabila penemuan yang patut dibuat adalah sama ada pihak pembelaan telah menimbulkan keraguan yang munasabah terhadap kes pendakwaan bahawa perayu pertama berada di tempat kejadian jenayah itu. Dalam keadaan berikut, hakim perbicaraan telah gagal mengambil kira pembelaan alibi perayu pertama sewajarnya dan secara berasingan dengan pembelaan perayu kedua (lihat perenggan 17–23).

(2) Hujah perayu pertama bahawa carta log-log panggilan dan ramalan liputan adalah tidak tepat sebagaimana lokasi geografi sebenar liputannya

dan tidak boleh diterima di bawah s 83 Akta Keterangan 1950 mempunyai merit. Tanpa mengira ketiadaan keterangan bantahan daripada mana-mana saksi lain, keterangan daripada orang yang bertanggungjawab untuk menyediakan cetakan komputer telah secara langsung menimbulkan isu kebolehpercayaan dan ketepatan log-log panggilan dan ramalan liputan itu. Log-log panggilan dan ramalan liputan tersebut merupakan keterangan penting untuk membuktikan kewujudan perayu pertama di tempat kejadian dan oleh itu adalah penting untuk hakim perbicaraan menumpukan perhatiannya kepada cabaran yang ditimbulkan oleh pembelaan berhubung ekshibit-ekshibit dan untuk membuat penemuan sama ada sememangnya terdapat pengubahan atau penyalahgunaan data dan sama ada kesahihan data boleh dipersoalkan atau sebaliknya. Kegagalan hakim perbicaraan untuk berbuat demikian akan membentuk salah arah yang serius, yang menyebabkan ekshibit-ekshibit tersebut tidak selamat untuk digunakan (lihat perenggan 24–29 & 37–46).

(3) Berdasarkan siri kejadian yang bercanggah dan tidak konklusif berhubung penemuan tempat kejadian jenayah dan jaket hitam dan barang kemas milik si mati, hakim perbicaraan patut lebih berhati-hati dan memeriksa sama ada keterangan saksi-saksi pendakwaan yang dikatakan bercanggah dan tidak konsisten adalah material; memeriksa kebolehpercayaan pegawai-pegawai polis yang menyoal siasat perayu-perayu berhubung maklumat s 27; memeriksa sama ada perayu-perayu telah menimbulkan keraguan berhubung ketepatan kenyataan-kenyataan s 27 masing-masing dan memeriksa sama ada penemuan itu telah dibuat menurut dan semata-mata hasil daripada maklumat yang diberikan oleh perayu-perayu dan bukan daripada sumber lain. Dalam kes ini hakim perbicaraan telah gagal untuk melaksanakan apa-apa pertimbangan sebelum menerima kenyataan-kenyataan itu di bawah s 27 dan berikutan itu terdapat salah arah oleh hakim perbicaraan (lihat perenggan 54–62 & 74–80).

(4) Setelah membuat satu penemuan yang menghubungkan antara bahan letupan dan kematian si mati, hakim perbicaraan sepatutnya membuat penemuan lanjutan untuk mengaitkan bahan letupan itu dengan perayu-perayu. Dengan tidak membuat penilaian yang mencukupi tentang keterangan sedemikian bagi tujuan membuat apa-apa penemuan berhubung milikan oleh perayu-perayu ke atas bahan letupan yang digunakan dalam pembunuhan itu, hakim perbicaraan telah gagal mengenal pasti ketiadaan kaitan itu, menyebabkan satu lagi salah arah (lihat perenggan 81–83).

(5) Walaupun ia adalah pendirian pendakwaan bahawa tiada keperluan untuk DSP Musa dipanggil sebagai saksi dan bahawa dengan tidak memanggil DSP Musa tidak mewujudkan jurang dalam kes

pendakwaan, keterangan membuktikan bahawa tugas perayu-perayu adalah untuk meronda kawasan rumah tertuduh ketiga dan bahawa kehadiran perayu-perayu di rumah tertuduh ketiga pada malam 19 Oktober 2006 adalah atas permintaan untuk bantuan daripada tertuduh ketiga kepada perayu pertama melalui DSP Musa. Oleh kerana hanya DSP Musa boleh mengesahkan skop permintaan yang dibuat oleh tertuduh ketiga kepadanya, DSP Musa adalah saksi penting untuk membuktikan kejadian itu, untuk menawarkan penjelasan fakta dan untuk merapatkan jurang dalam naratif kes pendakwaan. Dalam keadaan berikut, kegagalan pendakwaan untuk memanggil atau menawarkan untuk pemeriksaan balas DSP Musa akan menyebabkan inferens bertentangan di bawah s 114(g) Akta, terhadap pendakwaan (lihat perenggan 84–89).

(6) Selain daripada fakta bahawa sepasang selipar berlumuran kesan darah ditemui dari kereta perayu kedua, pendakwaan tidak mengemukakan apa-apa keterangan untuk menunjukkan apa-apa kaitan antara selipar itu dan perayu kedua. Hakim perbicaraan juga telah gagal mengambil kira bahawa selipar tersebut telah dijumpai selepas kunci kepada kereta perayu kedua telah diambil oleh seorang pegawai polis lain, iaitu DSP Khairi. Terdapat juga syak wasangka bahawa DSP Khairi mungkin mempunyai sesuatu berhubung kewujudan kartrij kosong yang ditemui dalam kereta perayu kedua. Walau bagaimanapun, hakim perbicaraan telah gagal menumpukan fikiran beliau kepada lompang tersebut dalam kes pendakwaan (lihat perenggan 90–100).

(7) Pertuduhan terhadap perayu-perayu di bawah s 302 dibaca bersama s 34 Kanun iaitu menurut niat bersama kedua-dua mereka, mereka telah membunuh si mati. Walau bagaimanapun, dalam alasan penghakiman, hakim perbicaraan tidak membuat apa-apa penemuan berhubung sama ada pendakwaan telah membuktikan bahawa terdapat apa-apa rancangan yang diatur sebelumnya oleh perayu-perayu untuk melakukan pembunuhan dan bahawa pembunuhan itu telah dilakukan menurut rancangan tersebut. Ketiadaan penemuan sedemikian oleh hakim berhubung elemen niat bersama membentuk salah arah kerana ketiadaan arah (lihat perenggan 105–106).

(8) Sebagai rukun am, mahkamah akan membatalkan sabitan di mana terdapat salah arah. Dalam keadaan luar biasa, suatu sabitan akan dikekalkan meskipun terdapat salah arah di mana mahkamah berpuas hati bahawa tribunal yang munasabah telah mensabitkan tertuduh berdasarkan keterangan sedia ada berhubung arahan yang wajar. Walau bagaimanapun, berdasarkan keterangan yang dikemukakan dalam kes ini, ia bukan kes yang sesuai dan wajar untuk menggunakan proviso tersebut. Mahkamah bawahan tidak menghiraukan dan terlepas pandang tentang fakta penting dan keterangan yang berpihak kepada

perayu-perayu yang telah mengakibatkan keadilan tidak dilaksanakan sewajarnya terhadap perayu-perayu. Kesan kumulatif ketiadaan arahan itu telah menyebabkan sabitan-sabitan perayu-perayu tidak wajar. Selanjutnya, kes pendakwaan bergantung kepada keterangan mengikut keadaan, yang tidak mencukupi dan tidak kukuh untuk mengekalkan penemuan kebersalahan perayu-perayu (lihat perenggan 108–109).]

Notes

For cases on admissibility of statement, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2177–2198.

For cases on failure to call witness, see 7(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 3259–3277.

For cases on misdirection, see 5(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 5472–5482.

For cases on s 34, see 4(2) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 2009–2028.

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1, SC (refd)
Amathevelli a/p P Ramasamy v PP [2009] 2 MLJ 367; [2009] 2 AMR 281, FC (refd)
Chan Chwen Kong v PP [1962] 1 MLJ 307, CA (refd)
Francis Anthonysamy v PP [2005] 3 MLJ 389, FC (refd)
Gooi Loo Seng v PP [1993] 2 MLJ 137, FC (refd)
Illian & Anor v PP [1988] 1 MLJ 421, SC (refd)
Lee Kwai Heong & Anor v PP [2006] 2 MLJ 528; [2006] 1 CLJ 1043, CA (refd)
Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)
Mahbub Shah v Emperor AIR 1945 PC 118, PC (refd)
Md Desa bin Hashim v PP [1995] 3 MLJ 350, FC (refd)
Pang Chee Meng v PP [1992] 1 MLJ 137, SC (refd)
PP v Datuk Hj Sahar Arpan [1999] MLJU 325; [1999] 3 CLJ 427, HC (refd)
PP v Kanapathy a/l Kupusamy & Anor [2001] 5 MLJ 20, HC (refd)
PP v Mohd Farid bin Mohd Sukis & Anor [2002] 3 MLJ 401, HC (refd)
Seneviratne v R [1936] 3 All ER 36, PC (refd)
Teoh Hoe Chye v PP Yeap Teong Tean v PP [1987] 1 MLJ 220, SC (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259; [2001] 1 CLJ 381, FC (refd)
Yau Heng Fang v PP [1985] 2 MLJ 335, SC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60(1)
Evidence Act 1950 ss 27, 83, 90(2), 114(g)
Penal Code ss 34, 302
Police Act 1967 s 97

Appeal from: Criminal Trial No 46–3 of 2006 (High Court, Shah Alam)

Hazman Ahmad (J Kuldeep Kumar with him) (J Kuldeep Kumar & Co) for the first appellant.

Kamarul Hisham Kamaruddin (Hasnal Rezua Merican, Ahmad Zaidi Zainal, Lim Kon Keen and Mohd Ruzaini Zulkifli with him) (The Chambers of Kamarul Hisham & Hasnul Rezua) for the second appellant.

Tun Abd Majid bin Tun Hamzah (Manoj Kurup, Noorin Badaruddin, Tengku Intan Suraya and Chan Lee Lee with him) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] There are two appeals before us, both against conviction and sentence passed by the High Court at Shah Alam. The first appeal B-06A-19 of 2009 was filed by Azilah bin Hadri ('the first appellant') while the second appeal B-06A-19A of 2009 was filed by Sirul Azhar bin Umar ('the second appellant'). My learned brothers, Apandi Ali JCA and Linton Albert JCA have read and contributed valuable input and approved this judgment. This is our judgment.

[2] The appellants were members of the *Unit Tindakan Khas* ('UTK') or the Special Action Unit of Polis Diraja at Bukit Aman, Kuala Lumpur with the rank of inspector and corporal respectively. They were charged with an offence under s 302 read together with s 34 of the Penal Code ie that in furtherance of their common intention, they had committed the murder of one Altantuya Sharibu, a Mongolian citizen. The offence was allegedly committed between 10pm on 19 October 2006 until 1am on 20 October 2006 at a place between Lot 12843 and Lot 16735, Mukim Bukit Raja in the district of Petaling in the State of Selangor Darul Ehsan. One Abdul Razak bin Abdullah ('the third accused') was charged for abetting the appellants in the commission of the murder. The cases of murder and abetment were heard together.

[3] We do not wish to set out the facts in full. Suffice to state that the deceased had an affair with the third accused. After the affair ended, the deceased came to Kuala Lumpur on 8 October 2006 accompanied by her maternal cousin and a friend to see the third accused but the third accused refused to see her. The deceased had apparently blackmailed the third accused and had threatened the life of his daughter.

[4] To protect his family from the deceased's harassment and threat, the third accused, apart from hiring a private investigator, had sought assistance from one DSP Musa bin Safri to arrange for the police to patrol the vicinity of his house at Damansara Heights. At this juncture it is relevant to state that DSP Musa was not called as a prosecution witness.

[5] The appellants (who do not personally know the third accused) were the police officers who had agreed to undertake the task of patrolling the house. The task was undertaken at the request of DSP Musa initially to the first appellant which led to the first appellant meeting up with the third accused at his office and thereafter several telephone conversations and SMSes were exchanged between the first appellant and the third accused. The first appellant then roped in the second appellant to assist him in the said task. On the night of 19 October 2006 when the deceased came to the house of the third accused, she was taken away in a car driven by the first appellant together with the second appellant and SP7 in the said car. Later, at Bukit Aman, the deceased was last seen in the car of the second appellant.

[6] A police report lodged on 20 October 2006 on the disappearance of the deceased triggered police investigation. On 6 November 2006, fragments of human bone and tissue were discovered in the forest area in Puncak Alam, Selangor (within Lots No 12843 and 16735, Mukim Bukit Raja, Petaling). The DNA analysis proved to be one of Altantuya Shaaribuu. Having examined the remains, the forensic pathologist (SP70) certified that the cause of death was 'probable blast related injuries'.

[7] The prosecution's case rests on circumstantial evidence. Apart from the evidence showing the deceased to be last seen with the appellants, the prosecution relied on the following evidence to connect the appellants to the murder:

(a) the call logs from the handphone of the first appellant;

(b) the statements of the first appellant leading to the discovery of the crime scene and of the second appellant leading to the discovery of the jewellery belonging to the deceased;

(c) the CCTV of Hotel Malaya where the deceased stayed, showing the presence of the appellants on 18 October 2006;

(d) the discovery of a pair of slippers smudged with blood in the second appellant's car;

(e) the smart tag device slot recovered from the second appellant's car showing the movement of the second appellant's car on 19 October 2006 and 20 October 2006 entering/exiting through Kota Damansara/Jalan Duta;

(f) the discovery of a spent cartridge (exh P185B) from inside the second appellant's car;

(g) the forensic video analysis photograph taken from CCTV at Plaza Tol Kota Damansara showing the second appellant's car passing through the said plaza tol on 19 October 2006; and

(h) the discovery of the notes consistent with the handwriting of the third accused from inside the bag of the first appellant.

[8] In the course of the trial, the third accused had filed an application for bail. The application was supported by an affidavit exculpating him from the crime. Except for certain paragraphs which were expunged, the learned trial judge accepted the affidavit of the third accused as forming part of the evidence for the prosecution. His Lordship found that the affidavit which was corroborated in material particulars by the evidence of SP1, SP6, SP9 and the other surrounding circumstances have negated and nullified the act of abetment as alleged against the third accused.

[9] At the end of the prosecution's case, the learned trial judge found that the prosecution had made out a prima facie case against the first and second appellants. The appellants were called to enter defence while the third accused was acquitted and discharged. No appeal was filed by the public prosecutor against the acquittal and discharge of the third accused.

[10] The first appellant gave evidence under oath. His evidence is that at the material date and time, he was not at the scene of the crime but at Wangsa Maju as per his notice of alibi (exh D430). He denied uttering those statements relating to the scene which was admitted by the court as evidence leading to discovery of facts under s 27 of the Evidence Act. It was also the evidence of the first appellant that he was not the last person to be with the deceased. According to the first appellant, he had handed over the deceased to the second appellant for the second appellant to send back the deceased to the hotel.

[11] The second appellant gave an unsworn statement from the dock. The statement sets out the events from the time the first appellant called him on 18 October 2006. The statement explains his presence with the first appellant at Hotel Malaya on 18 October 2006 and at the third accused's house on 19 October 2006. He also sets out the events after 20 October 2006 ie between 31 October 2006–5 November 2006 when he was on duty escorting the Prime Minister to Pakistan; the events that took place after he was brought back to Kuala Lumpur from Pakistan on 6 November 2006 and the events which took place on 7 November 2006 where he was said to make the statements leading to the discovery of the jewellery belonging to the deceased. In essence his defence was that he has been made a 'scapegoat'.

[12] The learned trial judge dealt with the defence in the following manner:

> 150. Having heard the defence of the first and the second accused, what is required of the court to decide at this stage, is whether the prosecution in the light of the defence's case has proved its case beyond reasonable doubt for the accused to be found guilty and convicted and charged or whether the defence have cast reasonable doubt which warrant their acquittal.

151. The first accused did not call any of his witness to support his defence and his alibi. The station diary (D428) was likewise not formally proven. The law relating to the non-calling of a witness by the defence is well settled ie notwithstanding that, it should not be made subject of adverse comment by the court and that s 114(g) of the Evidence Act should not be invoked against the accused person. The court must still consider whether he has nevertheless succeeded in casting a reasonable doubt on the prosecution's case.

152. The law relating to the weight to be attached to the unsworn statement from the dock which is not subjected to cross examination by the prosecution, is likewise settled ie notwithstanding that the weight to be attached to this category of defence may not be the same as one attached to the defence upon evidence on oath, but the court must no (sic) reject it *ipso facto*, instead must consider it for whatever it worth (sic) having regard to the other evidence available and to see whether the defence has succeeded in casting a reasonable doubt on the prosecution's case.

153. I have kept at the forefront of my mind of the two aforesaid principles in considering the respective defence of these two accused persons.

154. Having heard the submission of both the defence and the prosecution and having considered and tested the defence put up by both the First and Second Accused person, individually and jointly against the totality of the evidence for the prosecution, I find that the defence of each of the accused have essentially been one of denial, of blaming one another, irreconcilable and ambivalent. Consequently they have failed to raise any reasonable doubt on the prosecution's case. To respectfully paraphrase the famous words of Thomson CJ in *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307 ie the several strands of physical and circumstantial evidence of the prosecution have remained unrebutted, unexplained and unanswered by both accused persons. The combined strength of those strands of evidence when twisted together has formed two ropes, strong enough to hang each accused person.

[13] In the final paragraph of the judgment, the learned trial judge states that he was satisfied that the prosecution had proved the case against both the appellants beyond reasonable doubt and accordingly found both appellants guilty and convicted as charged whereby both the appellants were sentenced to death.

THE APPEAL

[14] Before us, learned counsel for the first appellant advanced the following grounds of appeal:

(a) the learned trial judge did not direct his mind, did not consider and did not evaluate exh D428 ('the station diary') as to whether it had casted a reasonable doubt on the prosecution's case;

(b) the learned trial judge failed to address his mind that the data in the call

logs P27, P370 and P372B were tampered with and that there were alterations, not authentic and were inaccurate;

(c) the learned trial judge erred in law and in fact in admitting the information under s 27 of the Evidence Act 1950 allegedly given by the first appellant;

(d) the learned trial judge did not consider the fact that the first appellant could not have the possession and control of C4 explosives; and

(e) the learned trial judge erred in law and in fact in failing to consider the first appellant's defence independently as to whether it casted a reasonable doubt and that the learned trial judge erred in considering the second appellant's unsworn statement that both appellants were 'blaming each other' in convicting the first appellants.

[15] The second appellant had also put forth five main grounds for the appeal. However, in the course of the submission, learned counsel decided not to pursue the first ground ie that the second appellant in the trial in the High Court had been exposed and had received adverse publicity that had resulted in a mistrial. That leaves four main grounds of appeal which are:

(a) that the failure to call DSP Musa and to tender crucial evidence in the form of SMS communication between DSP Musa and the third accused amounted to a serious suppression of evidence resulting in an abuse of the process of the court and thereby a mistrial;

(b) that the trial judge had wrongly admitted s 27 statement purportedly made by the second appellant purportedly leading to the discovery of certain 'barang-barang kemas' in a black jacket in the second appellant's room of his house;

(c) that the trial judge had wrongly relied on the evidence of blood stain purportedly found on a pair of slippers alleged to be in the second appellant's car which was held to be proof of his guilt; and

(d) that the trial judge had wrongly relied on mtDNA evidence of the blood stain found on the slippers which was held to prove the guilt of the second appellant.

[16] We shall now consider the grounds raised by the appellants.

DEFENCE OF ALIBI OF THE FIRST APPELLANT

[17] The issue of alibi forms the subject of the first appellant's first and fifth grounds of appeal. The first appellant contended that he was not at the scene of the crime at the particular time stated in the charge which is between 10pm on

19 October 2006 until 1am on 20 October 2006. A notice of alibi was served on the prosecution on 24 May 2007. The notice (exh D430) states that:

(i) Dari jam lebih kurang 10.00 malam hingga jam lebih kurang 10.25 malam 19/10/2006 tertuduh berada di kawasan Bukit Aman.

(ii) Dari jam lebih kurang 10.25 malam sehingga jam lebih kurang 11.45 malam, pergi, balik dan berada di Seksyen 4 Wangsa Maju di gerai makan dekat Carrefour Kuala Lumpur;

(viii) Dari jam lebih kurang 11.45 malam 19/10/2006 hingga jam lebih kurang 12.20 pagi 20/10/2006 berada di kawasan Bukit Aman.

(ix) Dari jam lebih kurang 12.20 pagi 20/10/2006 beredar dari Bukit Aman dan sampai di Putrajaya lebih kurang 1.00 pagi 20/10/2006.

[18] In support of the defence of alibi, the first appellant tendered a copy of the station diary (exh D428) which was confirmed by the prosecution to be an authentic copy. The station diary states:

19/10/06 2218 - C/Insp Azilah ambil senjata Glock EAH 387 dan 2 magazine Glock, keadaan baik.

19/10/06 2210 - C/Insp Azilah berlepas ke Putrajaya untuk tugas eskot Timbalan Perdana Menteri.

[19] The call detail record of the first appellant's handphone No 0193636153 (exh P27) produced by the prosecution shows the following:

10/19/2006- 22:15:51 - CPEKANSUBANG

10/19/2006 - 22:19:33 - CKGMELAYUSBG

10/19/2006 - 22:43:06 - PUNCAKALAMHWY4

10/19/2006 - 23:16:46 - PUNCAKALAMHWY4

[20] Thus, based on the call log, the first appellant was at Pekan Subang area at 10.15pm on 19 October 2006 and was at Kg Melayu Subang at 10.19pm. On the other hand, the station diary shows that the first appellant was at Bukit Aman at 10.18pm collecting a glock. The entries in the station diary, as confirmed by ASP Tony ak Lunggan, the investigating officer ('SP75') is a true and accurate record as provided for under s 97 of the Police Act 1967.

[21] It was contended by learned counsel for the first appellant that the evidence of D428 had casted a reasonable doubt on those entries in the call logs and that the learned trial judge should have directed his mind to the two contradicting sets of evidence and in failing to do so, had seriously misdirected himself.

[22] Having perused the grounds of judgment, we do not find anywhere in the said judgment that the learned trial judge had considered whether the station diary and the evidence that the first appellant was at Wangsa Maju and at Bukit Aman at the material time shows or tends to show that by reason of the presence of the first appellant thereat, he cannot be or is unlikely to be at Puncak Alam. In the circumstances, we agree with learned counsel that the learned trial judge had misdirected himself by way of non-direction in failing to consider the evidence.

[23] It is trite law that an accused person putting forward a defence of alibi bears no legal burden to establish it (*Yau Heng Fang v Public Prosecutor* [1985] 2 MLJ 335; *Illian & Anor v Public Prosecutor* [1988] 1 MLJ 421). In this regard, the learned trial judge had further misdirected himself in making a finding that D428 was not formally proven when the finding that ought to have been made was whether the defence had casted a reasonable doubt on the prosecution's case that the first appellant was at the scene of the crime, which the learned trial judge had failed to do. The learned trial judge had indeed failed to consider the defence of alibi of the first appellant sufficiently and independently of the second appellant in coming to the conclusion that '… the defence of each of the accused have been essentially one of denial …'

THE CALL LOGS AND COVERAGE PREDICTIONS

[24] For purposes of proving that the first appellant was at the crime scene, the prosecution relied on exhs P27, P370 and P372B. The exhibits are computer print-outs which were obtained pursuant to the request made by the police on 30 May 2007 after the notice of alibi was served on the prosecution on 24 May 2007.

[25] In respect of P27, it was produced by the prosecution to show the movement of the first appellant when he was using his handphone. There is no dispute that P27 is not the original document. The original document is exh P370. P370 went through a series of alteration before it became P372B and then P27. P370 and P372B are therefore the source documents for exh P27.

[26] Exhibit P27 was prepared by SP61, the executive at the Special Project and Investigation Division, CELCOM. He 'scripted' the document to show the 'site name' and 'region'. There were no 'site name' and 'region' in the source documents and the columns in P370 and P372B were arranged differently ie 'Cell ID' and 'LAC inversed and 1800 calls from P372B were removed before it was reduced into exh P27.

[27] Exhibit P370, the location mapping dated 13 June 2007 was prepared by Syed Mustaqim ('SP62'). SP62 is the IT analyst. Vide his covering letter

(exh P369) SP62 emailed exh P370 to SP61. Upon receipt of the email, SP61 printed out exh P370 (which SP61 refers to as 'raw data') from his computer and using the 'raw data', prepared exh P27. The issue raised by learned counsel for the first appellant is that exh P370 was wrongly admitted as it does not satisfy the condition of s 90(2) of the Evidence Act which provides:

> "For the purpose of this section it may be proved that a document was produced by a computer in the course of its ordinary use by tendering to the court a certificate signed by a person who either before or after the production of the document by the computer is responsible for the management and operation of that computer or for the conduct of the activities for which that computer was used.

[28] We noted that it was not the evidence of SP61 that he was the person responsible for the management and operation of that computer. What he said was:

> Pada masa saya mencetak dokumen ini daripada computer saya, computer saya tersebut adalah di dalam berkeadaan baik dan di dalam perjalanan fungsinya yang biasa begitu juga printer untuknya.

[29] Despite the challenge, the learned trial judge did not make a finding that SP61 was the person responsible for the management and operation of that computer and hence the legal and procedural requirement of s 90(2) of the Evidence Act 1950 has been satisfied. In this regard, we find that there is merit in the complaint raised by learned counsel for the first appellant as in relation to such piece of evidence, the prosecution must not only prove its admissibility, but must ensure that all other established legal and procedural requirements are stringently adhered to (see *Public Prosecutor v Datuk Hj Sahar bin Arpan* [1999] MLJU 325; [1993] 3 CLJ 475).

[30] Further, in preparing exh P27, SP61 admitted to omitting some of the data found in P370, example data marked 'TRC'. According to SP61, he did not know or understand what 'TRC' means but that he was told by SP62 that 'TRC' is not relevant. SP62 in his evidence was not able to explain what 'TRC' meant as 'ianya di luar tugas saya'. The other information which was found in exh P370 which SP61 omitted to produce in exh P27 relates to information on particular time and date. In this regards SP61 said 'Saya mengakui P27 ini terdapat 117 transaksi yang diragui ketepatan datanya yang saya hanya menyedari setelah saya menyemak P344'.

[31] As to the source of the data in exh P370, the evidence of SP62 states:

Data-data dalam P370 adalah dari switch. … Data-data yang ditunjukkan dalam P370 adalah lengkap untuk setiap transaksi berkaitan talian 019 3636153. Sepanjang pengetahuan saya, ada berlaku ketinggalan data yang diambil dari switch. Oleh itu P370 ini mungkin juga berlaku ketinggalan data atau data yang tidak diperolehi.

[32] There is also this part of the evidence by SP62 in examination-in-chief:

Pada kali pertama saya 'retrieved' data dalan P370, saya ada menyemaknya dan dapati terdapat kesilapan dan ketidaktepatan. Kesilapan yang berlaku bukan pada sumber data tetapi kesilapan teknikal ketika membuat 'scripting' iaitu berkaitan kesilapan kedudukan LAC dan Cell ID untuk call type mobile terminating. Maksud mobile terminating ialah panggilan yang diterima dan termasuk juga text message yang diterima.

Berdasarkan P370, kesilapan kedudukan LAC dan Cell ID tersebut iaitu untuk call type untuk Voice MOT dan juga Voice MTC. Kesilapannya bukan untuk kesemua transaksi tetapi hanya untuk transaksi pada 17.10.2006 sehingga 19.10.2006. … Kesilapan di muka surat 9 pula ialah pada transaksi 19.10.2006 jam 22.43.06; 23:16:46; 23:26:53 dan 23:48:39 …

[33] In cross-examination of SP62 the following questions were asked:

S: Setuju, jika nombor Cell ID diterbalikkan atau disalahletakkan di dalam column LAC, interpretasi berkaitan lokasi atau site name berubah.

J: Setuju.

S: Begitu juga jika nombor LAC disalahletakkan di dalam column Cell ID, keadaan yang serupa berlaku iaitu 'site name'nya akan berubah.

J: Setuju.

S: Kamu setuju, jika nombor Cell ID tidak diletakkan di tempat yang ianya sepatutnya diletakkan, setuju yang 'site name' yang tertera juga tidak akan tepat.

J: Setuju.

PUT: Data sebenar dalam data base Celcom berkenaan maklumat call detail records bagi 019 3636153 adalah sebenarnya berbeza dari P370 ini.

J: Setuju.

[34] In re-examination, this was the evidence of SP62:

Saya bersetuju dengan peguam jika code Cell ID diletakkan di dalam column LAC, ianya akan memberi interpretasi yang lain kerana secara umumnya, jika Cell ID dimasukkan ke dalam code untuk LAC, lokasi site name akan berbeza, tetapi group network mesti ada 'rules' yang mereka gunakan untuk menentukan lokasi atau site name ini. Group Network Unit adalah lebih arif di dalam penentuan lokasi ini. Saya tidak arif dalam perkara ini.

[35] Obviously any mistake or uncertainty which concerns the date 19 October 2006 and the time after 10pm is crucial given that it forms the particulars of the alleged offence. Consequently it is crucial for the learned trial judge to make a finding on the reliability of exh P370 in particular, whether mistake or uncertainty if any, is material and whether it affects the site name as stated in P27.

[36] As for exh P372B, it was prepared by SP63, an engineer at CELCOM's Mobile Planning Division. Upon receipt of exh P370 from SP62, SP63 prepared P372B wherein he too added a new column 'site name' and 'region' using the programme/system in the computer. The system is maintained by another division ie the 'Regional Network Operation'. SP63 was also responsible for the preparation of the chart called 'coverage prediction' (exh P374) which was also relied upon by the prosecution to show the movement of the first appellant.

[37] It was the submission of learned counsel for the first appellant that the chart does not show the scene of the crime and it is inaccurate as to the actual geographical location of its coverage. In this respect, learned counsel for the first appellant submitted that the coverage prediction is inadmissible as its accuracy has not been proved and it contravenes s 83 of the Evidence Act 1950. Section 83 provides that the court shall presume that maps or plans purporting to be made by the authority or the Government of Malaysia or the government of any state were so made and are accurate.

[38] For ease of reference, the evidence in examination-in-chief of SP63 on how he came about doing the chart is reproduced below:

> Pada 16.6.2007 saya ada bersama-sama ASP Tonny dan DSP Gan dan seorang anggota polis bernama Chiam pergi ke beberapa tempat. … Saya dibawa ke Bukit Damansara terus ke Bangsar, kemudian ke Bukit Aman. Selepas itu saya di bawa ke Kota Damansara melalui TOL Jalan Duta melalui Lebuhraya Utara-Selatan, kemudian Lebuhraya NKVE dan keluar TOL Kota Damansara menghala ke Puncak Alam melalui Jalan Lama Sg. Buloh dan masuk ke laluan dari Subang ke Puncak Alam dan terus ke satu tempat yang dikatakan tempat kejadian di satu kawasan Bukit di Puncak Alam sebelum balik semula ke Kuala Lumpur.
>
> … Tujuan saya dibawa ke tempat-tempat tersebut untuk saya menunjukkan kedudukan Stesyen Pemancar Celcom di sepanjang jalan ke tempat-tempat tersebut kepada pihak polis. … Saya bawa bersama ketika itu suatu alat yang dipanggil 'drive measurement tools' iaitu untuk merekodkan panggilan yang saya sendiri buat di sepanjang jalan yang kami lalui. … alat ini dapat mengenalpasti lokasi Stesyen Pemancar yang 'capture' setiap panggilan saya di laluan tertentu. …
>
> … Selepas balik ke Kuala Lumpur dari tempat kejadian, saya telah menghasilkan satu carta yang dipanggil 'coverage prediction' untuk Stesyen Pemancar. Saya siapkan pada 18.6.2007 dengan menggunakan komputer saya. Komputer saya

ketika itu dalam keadaan baik di dalam perjalanannya yang biasa. Saya bertanggungjawab dalam aktiviti dan operasi komputer saya tersebut. Saya cetak senarai tersebut pada hari yang sama saya menyediakannya …

[39] The following is the cross-examination of SP63:

S: Apakah stesyen pemancar dalam Bahasa Inggeris

J: Base Station (BS)

S: Base station dapat dikenalpasti berdasarkan 4 digit pertama dalam satu Cell ID

J: Ya.

S: Cell ID yang akan menentukan di mana base station dalam site name atau berada di lokasi mana.

J: Setuju

S: Di dalam Call Details Record, Cell ID juga menentukan base station mana yang digunakan untuk sesuatu transaksi

J: Ya

…

S: Setuju 'the exact location' pengguna sesuatu handphone semasa transaksi dilakukan tidak dapat ditentukan.

J: Setuju.

S: Cell ID hanya menunjukkan sesuatu transaksi panggilan telah mengguna khidmat BS tersebut.

J: Ya.

S: Apabila sesuatu transaksi berlaku kemungkinan pemanggil berada di radius BS atau berada di sesuatu BS yang lebih kuat yang telah memberikan perkhidmatan transaksi pemanggil tersebut

J: Ya, setuju.

S: Jika 'line congested' transaksi panggilan tersebut boleh pergi ke BS yang lain untuk menyempurnakan panggilan tersebut.

J: Ya, boleh dengan syarat BS lain tersebut mempunyai liputan di kawasan pemanggil tersebut.

…

S: Kekuatan sesuatu BS, biasanya radiusnya berapa jauh untuk memberi sesuatu khidmatnya.

J: Tidak ada sesuatu radius yang tepat dan tetap.

S: Setuju, liputan di dalam sesuatu kawasan oleh sesuatu BS adalah 'overlapping' dengan beberapa BS lain.

J: Ya, setuju.

[40] SP63 also said 'Dalam keadaan 'down' ianya (BS) tidak berfungsi' and that he does not know if there is any BS which was 'down' in P27 and P372B on the relevant dates. SP63 was also asked in cross-examination 'Sekiranya terdapat kemungkinan bahawa maklumat mengenai site nama di dalam P372B, P27 dan P370 telah diubahsuai dan tidak tepat, ianya sukar ditentukan' to which he answered 'Ya, setuju'.

[41] SP63 was futher asked:

S: Merujuk kepada P374, coverage prediction is sebenarnya telah sedia ada di dalam sistem komputer kamu.

J: Saya tak faham soalan, tetapi maklumat mengenai kedudukan stesyen pemancar sebagaimana P374 memang telah sedia ada di dalam sistem komputer saya.

S: Siapakah yang memasukkan data mengenai kedudukan stesyen pemancar tersebut di dalam sistem komputer kamu.

J: Mengenai kedudukan stesyen-stesyen sebagaimana P374, ianya di masukkan oleh kakitangan jabatan saya.

S: Adakah pemetaan di dalam P374 ini mengikut maklumat pemetaan sebagaimana Jabatan Pemetaan.

J: Saya tak pasti.

S: Adakah maklumat di dalam P374 ini ada dihantar ke Jabatan Pemetaan untuk mengesahkan kawasan-kawasan sebenar pemetaan P374 tersebut

J: Tidak.

[42] If the information on the base station is already available as testified by SP63, one wonders why the need for SP63 to be taken by the police to the specific routes before he undertook the task of preparing the coverage prediction anew in P372B.

[43] Be that as it may, SP63 agreed that if there are any physical changes to the base station, the best serving site can be altered but he does not know when was the coverage prediction updated; he admitted that in P27 there were about 400 transactions whereas in P327B, there were about 1800 transactions.

[44] The learned trial judge found the evidence to be highly technical and as there was no rebuttal evidence from any other witness, he accepted the evidence on the call logs and coverage prediction.

[45] Looking at the evidence set out above, it is our view that notwithstanding the absence of any rebuttal evidence from any other witness,

the testimonies of SP61, 62 and 63 had inevitably put into issue the reliability and accuracy of the call logs and the coverage prediction.

[46] These call logs and coverage prediction are important pieces of evidence to establish the presence of the first appellant at the scene of the crime. In our judgment it is essential for the learned trial to address his mind to the challenge raised by the defence on the exhibits and to make a finding whether there was in fact an alteration or tampering of the data and whether the authenticity of the data was questionable or otherwise. Regrettably, this His Lordship failed to do, which in our judgment amounts to serious misdirection rendering the said exhibits unsafe to be relied upon.

INFORMATION LEADING TO DISCOVERY OF FACT UNDER S 27 OF THE EVIDENCE ACT 1950

[47] After a trial within a trial, the learned trial judge admitted the statements made by the appellants under s 27 of the Evidence Act 1950. The statement said to be given by the first appellant relates to the discovery of the scene of the crime and in respect of the second appellant, the discovery of the jewellery belonging to the deceased.

[48] In particular, the statements attributed to the first appellant were:

(a) in an interview where the first appellant was said to have informed Ch Insp Koh Fei Cheow ('SP20') 'dia boleh membawa saya untuk cuba mencari tempat kejadian perempuan Mongolia dibunuh tetapi OKT tidak tahu tentang nama kawasan dan kurang pasti lokasi kawasan'; and

(b) at the scene where the first appellant said 'Inilah tempatnya perempuan Mongolia diletupkan' and 'Inilah tempat perempuan Mongolia ditembak'.

[49] The statement said to have been made by the second appellant was 'Saya boleh tunjukkan barang kemas bilik perempuan … (excluded by the court) ada saya simpan di dalam rumah saya di Kota Damansara'. The statement was said to be made to ASP Zulkarnain bin Samsudin ('SP23').

[50] In challenging the admission of s 27 information, learned counsel for both the appellants had raised several grounds. Looking at the grounds and the submissions, we find that in essence the complaints relate to the non-direction by the learned trial judge of the issues raised in respect of the contradictions in the evidence for the prosecution and on the failure of the learned trial judge to address his mind whether the information leading to the discovery was in fact given by the appellants.

[51] Before we proceed, we pause to remind ourselves of the approach to be taken as regards s 27 information as stated by Abdul Hamid Omar LP in *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137:

> … we are firmly of the view that in invoking s 27 of the Evidence Act the courts should be very vigilant to ensure the credibility of the evidence by the police personnel in respect of the section, which is so vulnerable to abuse.

[52] We shall now deal with the statement of the first appellant. Making reference to his ID, the evidence of SP20 is that while interviewing the first appellant on 6 November 2006 'pada jam 5.23 petang - semasa membuat temubual dengan OKT, OKT telah dengan kerelaan memberitahu saya bahawa dia boleh membawa saya untuk cuba mencari tempat kejadian perempuan Mongolia dibunuh, tetapi OKT tidak tahu tentang nama kawasan dan kurang pasti lokasi tempat kejadian. OKT dengan kerelaan untuk menunjukkan jalan-jalan ke tempat tersebut'.

[53] The interrogating officer, DSP Zainuddin bin Abdul Samad ('SP21') testified 'pada jam 4.00 lebih petang 6.11.2006 Tertuduh pertama ada memberitahu saya yang beliau ingin menunjukkan tempat kejadian secara agak-agak kepada pegawai penyiasat. … Saya terus menghubungi I.O. iaitu ASP Tonny mengenai hasrat Tertuduh Pertama … Apa yang saya maksudkan dengan Tertuduh Pertama berhasrat menunjukkan tempat kejadian secara agak-agak kepada pegawai penyiasat maksud saya beliau berkata begitu kepada saya'. SP21 had followed SP20 to the scene in the same Pajero and when they reached the scene, SP21 said he does not know the name of the area.

[54] Worthy to note is the following two points. The first point is that there is no evidence from either SP20 or SP21 as to the words uttered by the first appellant. What was said in their evidence was their narration of what was allegedly said to them by the first appellant. Secondly, nowhere in the evidence of SP20 and SP 21 did the appellant ever mention the word 'Puncak Alam'. The evidence of SP20 shows that at about 5.20pm 'OKT tidak tahu nama kawasan'. However, we noted the following evidence from the prosecution witnesses.

[55] *Pegawai Turus Siasatan Khas* IPK Kuala Lumpur, Supt Zainol bin Samah ('SP19') states in his evidence that 'selepas Tertuduh Kedua ditangkap pada jam lebih kurang 4.15 petang …, saya telah dimaklumkan oleh ASP Tony ak Lunggan mengatakan bahawa kedua-dua Tertuduh Pertama dan Tertuduh Kedua telahpun membuat pendedahan. Pendedahan yang dibuat ialah mereka bersetuju untuk menunjukkan tempat kejadian di kawasan Puncak Alam'.

[56] The evidence of SP75 'Pada 6.11.2006 di sebelah petang saya berjumpa

DSP Zainuddin. DSP Zainuddin memaklumkan saya yang Tertuduh Pertama dan Tertuduh Kedua telah ingin membawa dan menunjukkan tempat kejadian di kawasan Puncak Alam. Saya sampaikan maklumat ini kepada DSP Gan dan Supt. Zainol. Tetapi saya tidak maklumkan maklumat ini kepada Ch Insp Koh Fei Cheow, tetapi saya meminta Ch Insp Koh Fei Cheow membawa Tertuduh Pertama menunjukkan tempat kejadian. Ketika itu selain dari kawasan tempat kejadian dikatakan Puncak Alam, saya tidak mengetahui di mana lokasi khususnya."

[57] Supt Amidon Anan, the head of the forensic team (SP58) testified that at about 11am on 6 November 2006 he received the first phone call from SP19 followed by another phone call at 3.15pm asking him to standby to go to the crime scene and at 5.00pm he was asked to go to UiTM Puncak Alam.

[58] The first appellant's version is that he never gave the s 27 information. It was his case that in fact the police had prior knowledge of the location and that he was led to the scene by SP20 and SP21 whom according to the first appellant staged a show as though the first appellant had led to the discovery when the actual fact was that this was the case of the police leading the accused to a recovery of the deceased's remains.

[59] Now, if SP58 had been asked at about 5pm to gather at UiTM Puncak Alam before the first appellant was interviewed by SP20 to whom the information was allegedly given at about 5.20pm; if the first appellant, as the evidence of SP20 disclosed, did not know the name of the place and if, as per the evidence of SP21 that even at the time when the scene was discovered, SP21 does not know the name of the place, from where did the police obtain the information on Puncak Alam?

[60] Further, SP20 testified as follows:

S: Sila beritahu mahkamah apakah perkataan yang sebenar dikatakan oleh Tertuduh Pertama apabila menunjukkan tempat kejadian.

J: Tertuduh Pertama memberitahu saya 'Inilah tempat perempuan Mongolia diletupkan'.

S: Kemudiannya adakah Tertuduh Pertama menunjukkan kamu tempat lain selepas itu.

J: Ya, ada.

Selepas itu Tertuduh Pertama telah membawa saya pergi ke satu tempat lapang di mana dalam jarak lebih kurang 30 kaki dari tempat letupan dan memberitahu saya 'inilah tempat perempuan Mongolia ditembak'. Maklumat ini juga dicatatkan … dalam I.D. saya.

> Selepas itu, saya telah mengawal tempat kejadian tersebut dan kemudiannya memaklumkan kepada Supt. Zainol Samah (SP19) dan DSP Gan serta ASP Tonny berkenaan kejumpaan tempat kejadian tersebut. Saya maklumkan ketiga-tiga pegawai tersebut melalui handphone. Saya tidak tahu di mana mereka berada ketika itu.
>
> Semasa saya nampak rangka dan serpihan tulang-tulang yang kami percaya tulang manusia, saya nampak jelas tanpa bantuan cahaya lampu. Ketika itu 'visibility' masih terang. DSP Zainudin (SP21) ada juga bersama saya ketika itu. Beliau datang bersama saya, tetapi beliau tidak terlibat di dalam peranan mencari tempat kejadian ini …

[61] SP21 states:

> Selepas berhenti Ch. Insp Koh bawa Tertuduh keluar dan saya mengikut di belakang mereka dan tindakan seterusnya Ch. Insp Koh yang lakukan dan arahkan. Apa yang saya nampak, mula-mula Ch. Insp Koh telah bersama Tertuduh Pertama dan anggota escort telah pergi ke tempat yang dikatakan tembakan dilakukan ke atas wanita Mongolia dan selepas itu saya lihat mereka pergi ke dalam belukar iaitu tempat yang dikatakan wanita Mongolia tersebut diletupkan. Saya hanya ikut Ch. Insp. Koh dan Tertuduh Pertama serta escort ke tempat yang wanita Mongolia ditembak, tetapi saya tidak ikut mereka pergi ke tempat yang dikatakan beliau diletupkan. Saya tidak ikut ke tempat tersebut kerana ianya tidak membantu saya untuk maksud mengetahui tempat kejadian.

[62] There is thus a contradictory account of what the first appellant said and pointed out during their visit to the crime scene. According to SP20, the first appellant led them and pointed first to the place where the deceased was blown up and later to the place where the deceased was shot. The evidence of SP21 on the other hand shows that the first appellant had first led the police and pointed to the area where the deceased was shot.

[63] SP20 had also testified in examination-in-chief that upon discovery of the scene, he informed SP75 of the discovery through the handphone. This piece of evidence was denied by SP75. According to SP75, there was no phone call from SP20 regarding the discovery of the crime scene. SP21 who was together with SP20 did not see SP20 making any phone calls at the scene.

[64] During cross-examination of SP20, the following evidence was adduced:

> S: Semasa temubual, Tertuduh Pertama tidak memberitahu kamu nama kawasan di mana beliau sendiri kata yang beliau kurang pasti lokasi tempat kejadian tersebut.
>
> J: Setuju.
>
> S: Oleh itu pada masa itu tiada maklumat mengenai tempat kejadian

J: Tak setuju kerana terdapat maklumat mengenai tempat kejadian tetapi secara umum.

S: Apakah maklumat umum yang kamu maksudkan.

J: Tertuduh Pertama boleh cuba mencari jalan-jalan yang menunjukkan jalan-jalan ke tempat tersebut.

…

S: Tidak pernahkah terlintas kepada kamu ketika itu, yang Tertuduh Pertama tidak tahu tentang tempat kejadian tersebut.

J: Ya, mungkin

…

S: Bila kamu kata di dalam pemeriksaan utama bahawa kamu berhenti beberapa kali kerana silap jalan, ianya adalah disebabkan Tertuduh Pertama tidak pasti jalan-jalannya.

J: Ya.

S: Adakah terlintas di fikiran kamu, pada masa itu yang Tertuduh Pertama sebenarnya tidak tahu tempat kejadian tersebut.

J: Ya, mungkin.

[65] In re-examination, SP20 said 'Saya telah bersetuju dengan peguam ada kemungkinan Tertuduh Pertama tidak mengetahui tempat kejadian kerana Tertuduh Pertama tidak mengetahui lokasi tepat tempat kejadian dan sebab kami telah beberapa kali sesat jalan'.

[66] As regards the second appellant, SP20 was also the officer involved in interviewing the second appellant on 6 November 2006 at 2pm, together with ASP Zulkarnain bin Samsudin ('SP23'). The relevant evidence of SP20 is reproduced:

S: Apakah maklumat yang Tertuduh Kedua dedahkan

J: lanya berkaitan dengan barang-barang kemas yang dimiliki oleh perempuan Mongolia tersebut. Saya sendiri dengar maklumat yang dinyatakan Tertuduh Kedua tersebut. Maklumat ini didedahkan kepada ASP Zulkarnain.

S: Apakah maklumatnya secara tepat atau sebenar

J: Saya tidak ingat perkataan sebenar. Saya hanya ingat ianya berkaitan dengan barang-barang milik perempuan Mongolia tersebut.

Berdasarkan maklumat Tertuduh Kedua tersebut, saya nampak ASP Zulkarnain membuat repot polis mengenai pendedahan Tertuduh Kedua tersebut iaitu pada hari yang sama. Selepas ASP Zulkarnain membuat laporan polis, ASP Zulkarnain mengetuai satu pasukan polis … dan

> bersama Tertuduh Kedua telah bertolak ke rumah Tertuduh Kedua dengan dipandu (guided) oleh Tertuduh Kedua …
>
> …
>
> Bilik tidur Tertuduh Kedua tidak berkunci. Yang saya ingat, ASP Zulkarnain, saya, DPCorp Chiam dan Tertuduh Kedua yang masuk ke dalam bilik tidur tersebut. Di dalam bilik tersebut, Tertuduh Kedua telah membuka almari baju dan menunjukkan sehelai jaket hitam. Saya nampak ASP Zulkarnain mengeluarkan jacket hitam tersebut dan meletakkan di atas katil. Saya juga nampak ASP Zulkarnain mengeluarkan barang-barang kemas dan jam dari poket bahagian dalam jacket tersebut.
>
> Merujuk kepada gambar ID60H … saya hadir semasa gambar-gambar ini diambil.
>
> Sebelum Tertuduh Kedua menunjukkan jacket tersebut, Tertuduh Kedua ada memberitahu ASP Zulkarnain sesuatu tetapi saya telah lupa apa yang beliau katakan. Saya juga tidak ingat lagi apa-apa perbualan di antara Tertuduh Kedua dan ASP Zulkarnain selepas Tertuduh Kedua menunjukkan jacketnya …

[67] The evidence of SP23 is that in the course of interviewing the second appellant, the second appellant said 'Saya boleh tunjukkan barang kemas milik perempuan … ada saya simpan di dalam rumah di Kota Damansara'. At the house, the second appellant was alleged to have said 'Saya simpan barang kemas dalam jaket'. After the jewellery was taken out and put on the bed, SP23 asked the second appellant 'adakah ini barang-barang kemas yang dimaksudkan', the second appellant nodded his head and pointed his finger to the jewellery saying 'inilah barang dia'.

[68] It was further the evidence of SP23 that 'Tertuduh Kedua sendiri keluarkan jaket tersebut dan memberitahu sesuatu kepada saya. Akibat dari apa yang beliau beritahu saya telah membuat pemeriksaan di dalam jaket tersebut dan menjumpai 3 jenis barang … Semasa dalam bilik di rumah Tertuduh Kedua, apabila Tertuduh Kedua mengeluarkan jaket dari dalam almari, Tertuduh Kedua ada berkata sesuatu iaitu 'Saya simpan barang kemas di dalam jaket'.

[69] The second appellant similarly denied giving such information relating to the jewellery of the deceased. His version is that it was SP23 who had said the following words to him 'Macam inilah Sirul, kalau engkau setuju, engkau ikut aku, kau camkan barang-barang itu, kau pegang dan tunjuk ke arah barang itu sambil camera man ambil gambar'.

[70] Inside his room, the second appellant contended that SP23 had forced

him to hold one black jacket for the purpose of him being photographed twice. SP23 then took out some items from inside the same jacket and placed them on the bed before forcing him to point by his finger at all those items again for his pictures to be taken. The second appellant is thus saying that the police had planted the jewellery in his house. Relevant to this issue is the fact that the keys to the house was in the possession of the police prior to the search of a black jacket from inside the unlocked cupboard in the second appellant's unlocked room.

[71] The evidence of SP20 and SP23 will now be examined against the second appellant's version.

[72] According to SP20 who was together with SP23 and had witnessed the said discovery, the jacket was not taken out by the second appellant but was taken out by SP23. The jewellery was also put on the bed by SP23 where SP23 then said 'adakah ini barang-barang kemas yang dimaksudkan' after which the second accused was said to nod his head and replied 'inilah barang dia'. SP23 on the other hand said that it was the second appellant who took a black jacket. While taking out the said jacket the second appellant told SP23 'saya simpan barang kemas di dalam jacket'.

[73] The testimony of Corp Chiam Swee Guan (TWR2 in *voir dire*) to whom the second appellant was handcuffed throughout the process of discovery shows the following. At one point in his evidence, he said 'ASP Zulkarnain tanya Tertuduh Kedua berkenaan dengan barang kemas yang berada di atas katil, lalu Tertuduh Kedua beritahu inilah barang dia'. At another point when he was asked 'Apa yang ASP Zulkarnain tanya Tertuduh Kedua berkenaan barang-barang kemas tersebut sebelum Tertuduh Kedua berkata inilah barang- barang dia', TWR2 answered 'Saya tidak pasti apakah soalan ASP Zulkarnain kepada Tertuduh Kedua tersebut'. And finally when asked 'Adakah kamu dengar apa-apa arahan daripada ASP Zulkarnain kepada Tertuduh Kedua berkenaan barang kemas tersebut' TWR2 said, 'Ya, ada. ASP Zulkarnain ada arahkan Tertuduh Kedua tunjukkan jarinya kepada barang-barang kemas tersebut sebelum jurugambar mengambil gambar beliau menunjukkan jarinya kepada barang-barang kemas tersebut'.

[74] There is thus a conflicting and inconclusive account of events as regards the discovery of the black jacket and the jewellery. There is also no conclusive account of what exactly was said by the second appellant as regards the jacket. According to SP23, the second appellant said 'saya simpan barang dalam jacket' whereas the evidence of SP20 does not disclose any such statement being made. What SP20 said was 'Sebelum Tertuduh Kedua menunjukkan jacket, Tertuduh Kedua ada memberitahu ASP Zulkarnain sesuatu tetapi saya telah lupa apa yang beliau katakan …'. TWR2 supports the second appellant's

version that it was SP23 who had directed the second appellant to point to the jewellery on the bed. The true substance of the information given by the second appellant is thus not altogether clear.

[75] Further, SP20 said that after the information was received from the second appellant during the interview, SP23 made a police report. This is confirmed by SP23 where he said '… Saya membuat laporan polis berhubung dengan maklumat tersebut. Saya membuat laporan polis tersebut di pejabat saya sendiri …' The prosecution produced the report marked P76. There was however another report tendered by the defence, marked D91. In D91, the rank of SP23 was stated as Ch Inspector although at the material time he was an ASP; his name was wrongly spelt and his date of birth was wrongly stated. P76 was the amended version of D91. The 'pembetulan' (the word used by SP23) was done by SP23 after the discovery at the second appellant's house and the correction among others, was to change the word 'penama' in D91 to 'suspek' as appeared in P76 and to change the word 'yang saya simpan' in D91 to the words 'ada saya simpan' as appeared in P76 and also to add in the word 'sesuatu' in P76 which word was not originally found in D91.

[76] If as testified by SP20 and SP23 that the second appellant had given the information during the interview and that after the second appellant gave the information, SP23 did make a police report before going to the house, it begs the question, why has SP23 got his own personal particulars wrong in the police report and why the need for SP23 to make corrections to the words relating to the information or statement allegedly given by the second appellants (putting aside the question whether the correction leaves a doubt as to the accuracy of the statement allegedly given by the second appellant). SP23 gave an explanation though as regards the discrepancies between D91 and P76. He said that it was typed by SP20.

[77] Given the need to be vigilant, the learned trial judge ought to have directed his mind and examined whether the contradictions or inconsistencies in the evidence of the prosecution witnesses are material; examined the credibility of SP20, SP21 and SP75 (in respect of the first appellant) and SP20 and SP23 (in respect of the second appellant); examined whether the appellants had raised a doubt on the accuracy of s 27 statement and examined whether the discovery was made by virtue of and exclusively as a result of the information supplied by the appellants and not from other sources (*Francis Anthonysamy v Public Prosecutor* [2005] 3 MLJ 389). If the police have prior knowledge of the information supplied by the accused, obviously the subsequent discovery will be based on such prior knowledge and not based on the information of the accused and this will render the information supplied by the accused inadmissible as it will not be the cause of the discovery (*Public Prosecutor v Kanapathy a/l Kupusamy* [2001] 5 MLJ 20; *Md Desa bin Hashim v Public*

Prosecutor [1995] 3 MLJ 350). A fortiori, as has been held by the Federal Court in *Amathevelli a/p P Ramasamy v Public Prosecutor* [2009] 2 MLJ 367; [2009] 2 AMR 281, that the actual words used in the information leading to discovery must be stated orally. This is not the position in the case before us.

[78] The learned trial judge however failed to undertake the above exercise. His Lordship's finding on the statements made under s 27 merely states:

> 129. Having considered all the issues raised by the first accused, I have no reasons to doubt the credibility and reliability of Ch Insp Koh Fei Choew's evidence that the first accused who is also a police officer and the investigation officer himself did in fact supply the information as aforesaid and that Ch Insp Koh Fei Choew had no prior knowledge of the particular place of the scene. I therefore find it difficult to exercise my discretion to exclude them.
>
> 130. Having considered all the issues raised by the second accused, I find that that the second accused has succeeded in showing the shoddy and slip shod manner in the investigation of some officers and the inconsistencies in the evidence of the prosecution's witnesses. To my mind, while inconsistencies in the testimony of the witnesses is expected, the fact remains that the said 'barang-barang kemas' were discovered consequence to the said informations supplied by him. I therefore likewise refuse to exercise my discretion to exclude them.

[79] Insofar as the second appellant is concerned, there were in fact three statements made ie (i) 'saya boleh tunjukkan barang kemas milik perempuan … ada saya simpan di dalam rumah saya di Kota Damansara' (ii) 'saya simpan barang kemas di dalam jacket' and (iii) 'inilah barang dia'. There was no finding by the learned trial judge as to which statement was admitted. To recap, the first statement had been the subject of correction by SP23; the second statement raises a doubt as to whether such an occasion exists (in the light of the testimony of SP20 and TRW2); and the third statement was made after the jewellery had been discovered.

[80] We find that there is a non-direction by the learned trial judge in failing to evaluate the evidence before admitting the statements under s 27.

POSSESSION AND CONTROL OF THE EXPLOSIVES

[81] The learned trial judge in his grounds of judgment states:

> 137. The way the deceased came about her death is very tragic indeed. It can be no doubt that whoever perpetrated this despicable and unthinkable act of blasting on the deceased must have intended to completely vanish the related evidence into the thin air. Whatever his motive was, it is a matter of law that the 'motive' although relevant has never been the essential to constitute murder. The question for which I am to determine at this stage is who could have possibly connected with the death of the deceased.

[82] It was the contention of learned counsel for the first appellant that although motive is not essential to be proved by the prosecution, the learned trial judge had failed to correctly address his mind that there was no evidence to show the first appellant had the custody and control of C4 explosives any time prior to his arrest.

[83] We agree with learned counsel. And although this ground was raised by the first appellant, we think it applies to the second appellant as well. DSP MV Sri Kumar a/l Madhavan Nair ('SP16') was the *pegawai latihan* in UTK. He testified on the explosives available and the procedure that need to be followed when taking the explosives from the store. His evidence shows that bombs are strictly controlled in the police store; that apart from 'latihan asas', the appellants had not undergone any other training relating to explosives and that the appellants may not have the necessary experience and skill to handle explosives. Having made a finding on the connection between the explosives and the death of the deceased, the learned judge should, in our judgment address his mind and to make a further finding to connect the explosives and the appellants. By not making sufficient appraisal of such evidence in order to make any finding on possession by the appellants of the explosives used in the commission of the murder, the learned trial judge had failed to address his mind on this missing link resulting in yet, another misdirection.

THE NON-CALLING OF DSP MUSA

[84] This ground raised by the second appellant finds its root in the affidavit of the third accused. As stated earlier, the affidavit of the third accused formed part of the evidence of the prosecution. On account that there was no rebuttal against the evidence of the third accused, the learned trial judge had acquitted and discharged him.

[85] Learned counsel for the second appellant had highlighted several discrepancies in the affidavit of the third accused when compared with the other evidence tendered by the prosecution, in particular as regards the averment on the timing of the request for assistance from the police and the averment that the third accused was not able to get in touch with DSP Musa on 17 October 2006. The argument of learned counsel for the second appellant is that not only is DSP Musa a relevant witness in unfolding the events but DSP Musa is the only witness who could contradict the statements made by the third accused in his affidavit. The prosecution's failure to produce the evidence of DSP Musa and to produce certain messages between DSP Musa and the third accused, argued learned counsel, amounts to a suppression of evidence resulting in an abuse of the process of the court which ought to result in a mistrial.

[86] The response from the learned DPP is that the prosecution has led evidence showing the frequency of calls between DSP Musa, the first appellant and the third accused; that the third accused sought the assistance of DSP Musa to introduce him to someone and DSP Musa eventually introduced the third accused to the first appellant; that there was a meeting between the the first appellant and third accused and that there was no cross-examination on the IO whether DSP Musa knew of what transpired during the meeting between the first appellant and the third accused on 18 October 2006. The prosecution's stand therefore is that there was no need for DSP Musa to be called as a witness and that the non-calling of DSP Musa creates no gap in the prosecution's case. The court, contended learned DPP, should only be concerned with whether the prosecution had proved that the appellants had committed the murder.

[87] With respect, we are not able to agree with the learned DPP for the following reasons. The third accused was tried jointly with the appellants where at the outset it was the prosecution's case that the third accused had conspired with the appellants to murder the deceased. It is incumbent upon the prosecution to adduce all available relevant evidence against the third accused. The affidavit which has been taken by the learned trial judge to be part of the prosecution's evidence contains prejudicial matters against the appellants and it tends to suggest the guilt of the appellants. In fact, since the third accused was acquitted and discharged with no appeal lodged by the prosecution, it appears that whatever that the appellants did in committing the crime was entirely on their own accord.

[88] However, it must not be overlooked that this ugly and horrendous episode started with the request by the third accused to DSP Musa before the appellants came into the picture. The evidence established that the appellants' task was to patrol the vicinity of the third accused's house and that the presence of the appellants at the third accused's house on the night of 19 October 2006 was upon the request for such assistance from the third accused to the first appellant.

[89] The learned trial judge is bound to view the whole of the evidence objectively and from all angles in finding whether the evidence or the facts point to the irresistible inference and conclusion that both the appellants committed this crime or whether there are some other reasonably possible explanation of those facts (see *Gooi Loo Seng v Public Prosecutor* [1993] 2 MLJ 137). Now that the task of patrolling the house had ended with murder, we agree with learned counsel for the second appellant that only DSP Musa can confirm the scope of the request made by the third accused to him. DSP Musa is therefore an important witness to unfold the event, to offer explanation of the facts and to close the gap in the narrative of the prosecution's case. It is our judgment that from the facts of this case, namely the role of DSP Musa in

bringing the two appellants into the picture of the entire episode, his evidence is essential to unfold the narrative upon which the prosecution's case is based on (see *Seneviratne v R* [1936] 3 All ER 36 and *Teoh Hoe Chye v Public Prosecutor; Yeap Teong Tan v Public Prosecutor* [1987] 1 MLJ 220). The failure of the prosecution to call or offer for cross-examination DSP Musa, in the circumstances of the evidence as a whole, would have triggered the adverse inference under s 114(g) of the Evidence Act 1950, against the prosecution.

THE PAIR OF SLIPPERS

[90] A pair of slippers with traces of blood stains on it (exh P153C) was recovered on 9 November 2006 by Sup Soo Me Tong ('SP42') from the second appellant's car. Upon DNA analysis by the chemist Mr Primulpathi ('SP39'), the said traces of bloodstain were confirmed as one from the same maternal lineage as that of the deceased.

[91] The learned trial judge made the following finding on the slippers:

> 136. I agree with the submission of the learned DPP that the traces of blood stain found the slippers from inside the second accused's car could not possibly be planted there for its recovery was on the 9 November 2006 whereas the remains of the deceased was found on the 6 November 2006 without any traces of fresh or dried blood and that the blood specimen of the deceased's father, Shaaribuu Setev (SP2) was taken only on the 10 November 2006. With respect, I also see the logic in the learned DPP's remark that the police could have easily put the soil taken from the scene on the said Suzuki CAC 1883 had they really wanted to frame the second accused.

[92] In essence, the argument advanced by learned counsel for the second appellant was that the identity of the user of the slippers at the material time the blood stain came to be on the slippers is a matter gravely in doubt.

[93] We agree with learned counsel for the second appellant. Apart from the fact that a pair of slippers smudged with blood stains (which was not conclusive to be that of the deceased but of someone sharing the same maternal lineage with the deceased), the prosecution led no evidence to establish anything else about the slippers. No DNA specimen was taken from the slippers to ascertain the identity of the user at the time the blood stain came to be on the slippers or that the slippers matches the size of the second appellant. We find no evidence to show any nexus between the slippers and the second appellant.

[94] The second appellant, in his statement said that he had left his car at Bukit Aman on 31 October 2006 before he left for Pakistan for his escort duty; that the car key was kept in a tray at his office; that he had asked *Sarjan* Rosli

(SP24) to start the car once in awhile; that he had nicely arranged his belongings in the boot of the car which includes a size 8 pair of slippers.

[95] According to SP24, he did not see the slippers, exh P153C in the second appellant's car when he warmed up the engine twice. He was certain about it. But more important is the following evidence of SP24: 'Pada 3hb saya tidak ingat bulan berapa, saya serahkan kunci kereta Tertuduh Kedua ini kepada DSP Mohd Khairi bin Khairuddin. DSP Mohd Khairi serahkan semula kunci kereta Tertuduh Kedua ini kepada saya pada 6hb bulan yang sama. Saya serahkan anak kunci Tertuduh Kedua kepada DSP Khairi kerana beliau memintanya. Saya tak tahu sebabnya. Selepas beliau serahkan kuncinya, saya letak semula anak kunci kereta Tertuduh Kedua tersebut ke dalam tray yang sama. DSP Khairi berpesan jika IO iaitu ASP Tonny datang meminta kunci yang sama pada malam nanti supaya menyerahkan kunci yang sama pada IO'.

[96] DSP Mohd Khairi was not called to testify. Hence there was no evidence as to what happened to the said car whilst it was in DSP Mohd Khairi's custody. The learned DPP submitted that what matters is that the slippers with the blood stain were found in the car. Of course it matters that the slippers were found in the second appellant's car but it matters too that the prosecution should exclude any possibility of the car being tampered with. It matters that the prosecution must close the gap especially when the slippers were recovered after the key to the second appellant's car was taken by DSP Mohd Khairi and it matters when learned DPP conceded that the mtDNA analysis on the blood on the slippers is not conclusive as it is only based on maternal lineage. The fact that DSP Mohd Khairi was offered to the defence does not excuse the prosecution (see *Abdullah Zawawi bin Yusoof v Public Prosecutor* [1993] 3 MLJ 1). The learned judge failed to consider all the above which failure had resulted in an injustice to the second appellant.

THE SPENT CARTRIDGE

[97] The other evidence found by the learned trial judge to be incriminating of the second appellant was the spent cartridge (exh P185B) recovered from inside the second appellant's car (on the floor between the driver seat and the door) on 9 November 2006. The chemist, Shaari Desa ('SP40') examined the cartridge found by SP42 and upon conducting a ballistic test on the cartridge, concluded that the spent cartridge had been discharged from a firearm type HK-MP55D (exh 263A).

[98] The prosecution led evidence through WPC Fatimah bt Abdul Wahab ('SP15') of Amoury of UTK Bukit Aman that the said firearm was issued to the

second appellant on 4 October 2006 and was returned on 30 October 2006. She testified that all bullets supplied to the second appellant had been returned by the second appellant to her.

[99] In the light of the evidence of SP15 that the second appellant took and delivered the exact number of bullets with none missing and in view of the fact that:

(a) the car at the material time was in the custody of DSP Mohd Khairi;

(b) DSP Mohd Khairi had asked SP24 to hand over the keys to the IO; and

(c) DSP Mohd Khairi was the Senior Officer, Logistics and Armoury Bukit Aman in charge of the bullets and firearms,

learned counsel for the second appellant submitted that there is grave suspicion that DSP Khairi may have had something to do with the appearance of the spent cartridge.

[100] We find merits in the submission of learned counsel. PW42, the forensic investigator who went to inspect the car on 9 November 2006 upon the request by the IO on the night of 8 November 2006 agreed with learned counsel's proposition that 'Adalah munasabah oleh itu bahawa sebelum kamu periksa kereta tersebut, beberapa orang telah masuk dan keluar dalam kereta tersebut dan kamu tidak tahu samada barang-barang yang dijumpai di dalam keadaan asal …'. As with the slippers, we find that there is a gap in the prosecution's case insofar as the cartridge is concerned which the learned trial judge failed to direct his mind to.

[101] The other evidence adduced by the prosecution to link the first appellant to the murder is the recovery of the notes (exh P80A) from inside the bag of the first appellant. The notes bear the name of the third accused's father, the house address, the telephone number, room number of Hotel Malaya and the name 'Aminah'. As regards the second appellant, a smart tag device and the T&G card showing the movement of the second appellant's car on 19 October 2006 and 20 October 2006 entering/exiting through Kota Damansara/Jalan Duta was adduced. The prosecution also adduced the evidence of forensic video analysis photograph obtained from CCTV at Plaza Tol Kota Damansara to show the passing of the second appellant's car through the Plaza Tol Kota Damansara on 19 October 2006 at 7:14:40am; 8:48:55pm; 10:03:53pm and 11:55:36pm.

[102] It is our judgment that the headwritten notes of the third accused found in the first appellant's bag has no bearing to connect the first appellant to the crime. The notes merely confirmed that he had met the third accused where according to the affidavit of the third accused, for purposes of asking the first

appellant to patrol the vicinity of his house, he had given the first appellant 'maklumat mengenai alamat Rumah saya, nama bapa saya, nama Si Mati, 'Hotel Malaya' di mana Si Mati tinggal (mengikut maklumat yang diberi PB kepada saya)'.

[103] The prosecution had suggested that the presence of the appellants at Hotel Malaya on 18 October 2006 was evidence of the appellants' intention to commit the crime. However, an inference favourable to the appellants may also be drawn ie that their presence was merely to confirm that the deceased was indeed staying at the hotel as per the information given by the private investigator to the third accused and by the third accused to the first appellant. As such, the presence of the appellants at Hotel Malaya does not establish a complete chain of evidence against the appellants to bring home their guilt. The fact that the appellants were last seen with the deceased shows opportunity for the commission of crime but there is a huge gap between opportunity and commission. The smart tag device and the CCTV showing the movement of the second appellant's car entering and exiting the Plaza Tol cannot cogently establish the second appellant's connection to the crime in light of the fact that the second appellant lives at Kota Damansara.

[104] The onus on the prosecution where the evidence is of a circumstantial nature is indeed a very heavy one. The circumstances must be fully and cogently established, the chain of evidence must be complete, the evidence must point irresistibly to the conclusion of the guilt of the accused and there must not be any gaps in the prosecution's case. If there are gaps in it, then it is not sufficient. Unless the court is satisfied that the facts proved are consistent with the guilt of the accused and the accused alone and every possible explanation other than the guilt of the accused has been excluded, the accused cannot be convicted based solely on circumstantial evidence (see *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805).

[105] There is one other aspect of this appeal. The charge against the appellants was under s 302 read together with s 34 of the Penal Code ie that pursuant to the common intention of both of them, they had committed the murder of Altantuya. Common intention within the meaning of s 34 implies a prearranged plan and to convict the accused of an offence by invoking the section it should be proved that the criminal act was done in concert pursuant to the prearranged plan. As has been often observed it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstances of the case (see *Mahbub Shah v Emperor* AIR 1945 PC 118; *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401).

[106] Except for the words 'individually and jointly' mentioned by the

learned trial judge in para 154 of the grounds of judgment, nowhere else did the learned trial judge address the acts or conduct of the appellants or the circumstances that give rise to or prove the prearranged plan to bring about the murder of the deceased. In the grounds of judgment, the learned trial judge made no finding on whether the prosecution has established that there was any prearranged plan by the appellants to commit murder and that murder was committed pursuant to that plan. In our judgment, the absence of such finding by the learned trial judge on the ingredient of common intention amounted to a misdirection by way of non-direction (*Mahbub Shah*). In fact, there was no evaluation of the evidence on the ingredient of common intention based on the principles as stated in *Lee Kwai Heong & Anor v Public Prosecutor* [2006] 2 MLJ 528; [2006] 1 CLJ 1043.

[107] Learned DPP who conceded that there are various non-directions by the learned trial judge invited us to invoke the proviso to s 60(1) of the Courts of Judicature Act 1964 which reads:

> Provided that the Court of Appeal may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in the favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

[108] It has been set out in *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259; [2001] 1 CLJ 381 that as a general rule, the court will, in the normal course of events, quash a conviction where there has been a misdirection. Exceptionally, a conviction will be upheld despite misdirection where the court is satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction.

[109] Looking at the whole evidence and circumstances of this case, we are of the view that this is not a fit and proper case for us to invoke the proviso. The circumstances relied upon by the prosecution had not been fully and cogently established and the chain of evidence is not complete. We cannot say if a reasonable tribunal properly directed would have convicted the appellants on available evidence. The court below had ignored and overlooked salient facts and evidence favourable to the appellants which resulted in serious and substantial miscarriage of justice to the appellants. In our judgment, the cumulative effect of these non-directions rendered the convictions of the appellants unsafe. Furthermore since the prosecution's case relied on circumstantial evidence, we have to adequately caution ourselves, in line with what has been said to be 'the combined strength of strands to make a rope strong enough to hang' in *Chan Chwen Kong v Public Prosecutor* [1962] 1 MLJ 307. It is our judgment that the circumstantial evidence are insufficient and not strong enough to sustain the finding of guilt of the appellants. We are conscious

that a heinous crime has been committed but where the guilt of the appellants had not been satisfactorily proved, we are constrained to give the benefit of doubt to the appellants. We, unanimously, allow both appeals. Conviction and sentence by the High Court is set aside. The appellants are accordingly acquitted and discharged.

Appeals allowed.

Reported by Kohila Nesan